



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 22, 2022

IN THE MATTER OF:

Appeal Board No. 625273

PRESENT: RANDALL T. DOUGLAS, MEMBER

In Appeal Board Nos. 625269 and 625270, the claimant appeals from the decisions of the Administrative Law Judge filed August 5, 2022, which sustained the initial determinations holding the claimant ineligible to receive benefits, effective June 21, 2021 through August 29, 2021, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$517.50 in benefits recoverable pursuant to Labor Law § 597

(4); and charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of \$1,500 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020.

In Appeal Board Nos. 625271 and 625272, the claimant appeals from the decisions of the Administrative Law Judge filed August 5, 2022, which modified the initial determinations holding the claimant ineligible to receive benefits, effective August 30, 2021 through October 3, 2021, on the basis that the claimant was not capable of work; charging the claimant with an overpayment of \$1,034.50 in benefits recoverable pursuant to Labor Law § 597

(4); and charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of \$300 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 to be effective August 30, 2021 through September 9, 2021, and as so modified, sustained the determinations and referred the matters back to the Department of Labor for recalculation of the overpayment.

In Appeal Board No. 625273, the claimant appeals from the decision of the Administrative Law Judge filed August 5, 2022, which sustained the initial determination disqualifying the claimant from receiving benefits, effective October 5, 2021, on the basis that the claimant voluntarily separated from employment without good cause.

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by and on behalf of the claimant and on behalf of the employer.

We have reviewed the entire record and have considered the testimony and other evidence. It appears that no errors of fact or law have been made insofar as they concern the issues of lack of total unemployment and recoverable overpayment in Appeal Board Nos. 625269 and 625270; and the issues of capability of employment and recoverable overpayment in Appeal Board Nos. 625271 and 625272. The findings of fact and the opinion of the Administrative Law Judge, insofar as they concern these issues, are fully supported by the record and, therefore, are adopted as the findings of fact and the opinion of the Board.

As to the issue of voluntary separation of employment without good cause in Appeal Board No. 625273, only, based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked as a per-diem personal care aide for the employer's per diem staffing agency from June 19, 2021 to August 28, 2021. Her duties included general assistance, light cleaning, companionship, and accompanying clients to medical appointments. The claimant was assigned to work for several clients based on her availability and her schedule varied.

On August 29, 2021, the claimant informed the employer that she had been exposed to the Covid-19 virus. She tested positive for the virus on August 30 and reported her positive test result to the employer. The claimant was released from quarantine as of September 9 and cleared by her primary care physician to return to work as of September 10. However, the employer's Covid team nurses dictate whether an employee can be returned to work after having had the Covid virus. Upon reporting to the employer that she had contracted the virus, the employer's Covid team stayed in contact with the claimant through September to determine whether she was able to be scheduled to work

with clients again. The last such contact was on September 28, 2021; as of that date the employer's Covid team had not yet cleared the claimant to return to work.

Pursuant to New York State regulation, all healthcare workers were required to be fully vaccinated against the Covid-19 virus by October 7, 2021. The employer informed the claimant that she was required to either be vaccinated or show proof of a medical exemption to the vaccination requirement by October 7. The claimant was not vaccinated and was in contact with her primary care physician about obtaining such exemption. Prior to October 7, if the employer's Covid team had cleared her to return to work, the claimant could have worked even though she was not vaccinated. The claimant was not given another assignment by the employer after August 28, 2021, because she was not cleared by the employer's Covid team to return to work.

OPINION: The credible evidence establishes that the claimant worked on a per diem basis and that her last per diem assignment ended on August 28, 2021. As a per diem employee, once the claimant's assignment ended, no employment relationship existed between the claimant and the employer until the claimant received a new assignment (see, Appeal Board Nos. 608687 and 568767). The employer conceded that the claimant had not been given a new assignment after August 28 because she tested positive for the Covid-19 virus and had not yet been cleared to work by the employer's Covid team.

Under these circumstances, it is not controlling that the claimant did not comply with the vaccine mandate effective October 7, 2021. As the claimant was no longer an employee after August 28, 2021, she could not thereafter have voluntarily resigned from her employment (see, Appeal Board No. 623533). Accordingly, we conclude that the claimant's employment ended under non-disqualifying circumstances.

DECISION: The decisions of the Administrative Law Judge in Appeal Board Nos. 625269, 625270, 625271 and 625272, are affirmed.

The decision of the Administrative Law Judge in Appeal Board No. 625273 is reversed.

In Appeal Board Nos. 625269 and 625270, the initial determinations, holding the claimant ineligible to receive benefits, effective June 21, 2021 through August 29, 2021, on the basis that the claimant was not totally unemployed;

charging the claimant with an overpayment of \$517.50 in benefits recoverable pursuant to Labor Law § 597 (4); and charging the claimant with an overpayment

of Federal Pandemic Unemployment Compensation of \$1,500 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, are sustained.

In Appeal Board Nos. 625271 and 625272, the initial determinations, holding the claimant ineligible to receive benefits, effective August 30, 2021 through October 3, 2021, on the basis that the claimant was not capable of work; charging the claimant with an overpayment of \$1,034.50 in benefits recoverable pursuant to Labor Law § 597 (4); and charging the claimant with an overpayment

of Federal Pandemic Unemployment Compensation of \$300 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, are modified to be effective August 30, 2021 through September 9, 2021, and as so modified, are sustained. These determinations are referred back to the Department of Labor for recalculation of the overpayment consistent with this decision.

In Appeal Board No. 625273, the initial determination, disqualifying the claimant from receiving benefits, effective October 5, 2021, on the basis that the claimant voluntarily separated from employment without good cause, is overruled.

The claimant is denied benefits with respect to the issues decided in Appeal Board Nos. 625269, 625270, 625271 and 625272.

The claimant is allowed benefits with respect to the issue decided in Appeal Board No. 625273.

RANDALL T. DOUGLAS, MEMBER